IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 34819

STATE OF IDAHO,	)	**2008 Unpublished Opinion No. 630**
	)	
Plaintiff-Respondent,	)	**Filed: September 4, 2008**
	)	
v.	)	**Stephen W. Kenyon, Clerk**
	)	
RUSSELL PHILLIP PEUGH,	)	**THIS IS AN UNPUBLISHED**
	)	**OPINION AND SHALL NOT**
Defendant-Appellant.	)	**BE CITED AS AUTHORITY**
	)	

Appeal from the District Court of the Fourth Judicial District, State of Idaho, Ada County. Hon. Cheri C. Copsey, District Judge; Hon. Thomas P. Watkins, Magistrate.

Appellate decision of district court affirming magistrate's order suspending driver's license, affirmed.

Lawrence Sirhall Jr., Boise, for appellant.

Hon. Lawrence G. Wasden, Attorney General; Lori A. Fleming, Deputy Attorney General, Boise, for respondent.

WALTERS, Judge Pro Tem

This is an appeal from a decision of the district court that upheld an order by a magistrate suspending Russell Peugh's driver's license. We affirm.

I.
BACKGROUND

Peugh was arrested for driving while under the influence, following an accident between his truck and another motor vehicle. He had no apparent injuries and he was transported to the police station, where he refused to submit to a breathalyzer test to measure his blood-alcohol concentration (BAC). He offered no reason why he would not take a BAC test except to tell the officer at the scene that someone, undisclosed, had advised him not to submit to any tests. An evidentiary hearing under Idaho Code § 18-8002 was held before a magistrate to afford Peugh the opportunity to establish why he refused to take the BAC test. The magistrate concluded from

the evidence that Peugh had failed in his burden to show a cause of sufficient magnitude that it might be said that a suspension of his license would be unjust or inequitable. The magistrate's decision was upheld on an appeal to the district court.

Because Peugh's brief on appeal does not contain a statement of the issues he presents on appeal as required by Idaho Appellate Rule 35,[1] we elect to review this case in the context described as the issue in the State's responsive brief.[2] The State phrases the issue as "Did the district court, in its appellate capacity, correctly conclude that Peugh failed in the trial court to meet his burden of showing sufficient cause for his refusal to submit to evidentiary testing?"

II.
STANDARD OF REVIEW

The Supreme Court has recently altered the standard by which we review a decision of the district court acting in its appellate capacity. Rather than directly reviewing the magistrate court's decision independently of, but with due regard for, the district court's decision, we instead directly review the district court's decision. *Losser v. Bradstreet*, 145 Idaho 670, 672, 183 P.3d 758, 760 (2008). We do examine the magistrate record to determine whether there is substantial and competent evidence to support the magistrate's findings of fact and whether the magistrate's conclusions of law follow from those findings. If those findings are so supported and the conclusions follow therefrom and if the district court affirmed the magistrate's decision,

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[1] Idaho Appellate Rule 35(a) recites in relevant part that the appellant's brief shall contain:

> (4) **Issues Presented on Appeal.** A list of the issues presented on appeal, expressed in the terms and circumstances of the case but without unnecessary detail. The statement of the issues should be short and concise, and should not be repetitious. The issues shall fairly state the issues presented for review. The statement of issues presented will be deemed to include every subsidiary issue fairly comprised therein.

[2] Idaho Appellate Rule 35(b) provides:

> (4) **Additional Issues Presented on Appeal.** In the event the respondent contends that the issues presented on appeal listed in appellant's brief are insufficient, incomplete, or raise additional issues for review, the respondent may list additional issues presented on appeal in the same form as prescribed in Rule 35(a)(4) above.

we affirm the district court's decision as a matter of procedure. *Id.*; *Nicholls v. Blaser*, 102 Idaho 559, 633 P.2d 1137 (1981); *State v. DeWitt*, 145 Idaho 709, 184 P.3d 215 (Ct. App. 2008).

III.
DISCUSSION

By the terms of I.C. § 18-8002(1), any person who drives a motor vehicle on the highways of this state is deemed to have given consent to evidentiary testing to determine concentration of alcohol or other intoxicants, provided that the officer making the request has reasonable grounds to believe that the person has been driving while under the influence of such substances. *See Thompson v. State*, 138 Idaho 512, 514, 65 P.3d 534, 536 (Ct. App. 2003); *State v. Nickerson*, 132 Idaho 406, 410, 973 P.2d 758, 762 (Ct. App. 1999); *State v. Harmon*, 131 Idaho 80, 85, 952 P.2d 402, 407 (Ct. App. 1998). If a driver refuses the test, his driver's license must be seized by the peace officer, and unless the driver requests a hearing on the matter, the license will be suspended. I.C. § 18-8002(4)(a), (c).

If the driver requests a hearing, the burden of proof is upon the driver, and the court must suspend all driving privileges unless it finds that the officer "did not have legal cause to stop and request [the driver] to take the test or that the request violated his civil rights." I.C. § 18-8002(4)(b). The Idaho Supreme Court has held that a motorist contesting the license suspension must prove at least one of the following: (1) that the peace officer stopping defendant did so without legal cause; (2) that the defendant was not requested by a peace officer to submit to an evidentiary test; (3) that the requesting peace officer did not have reasonable grounds or legal cause to believe that defendant had been driving or in actual physical control of a motor vehicle while under the influence of alcohol, drugs or of any other intoxicating substances; (4) that the request violated defendant's civil rights; (5) that defendant was not advised of the information regarding refusal mandated by I.C. § 18-8002(3); (6) that defendant did not refuse to submit to the requested evidentiary test; or (7) that, although defendant refused the requested evidentiary test, he did so with sufficient cause. *Head v. State*, 137 Idaho 1, 4-5, 43 P.3d 760, 763-64 (2002); *In re Griffiths*, 113 Idaho 364, 744 P.2d 92 (1987).

In the present case, Peugh chose to contest the license suspension under the seventh or "sufficient cause" element stated by the Court in *Griffiths.* In *Griffiths*, because their breath analyzing machine was not working properly, the arresting officers had requested that the defendant submit to a blood drawing for a BAC test. The defendant refused the officers' request

and on appeal from the order suspending his license, Griffiths argued that he had a fear of needles which prevented him from submitting to the blood drawing for a BAC test. He did not inform the officers of this fear but simply refused to submit to the test offered by the officers. On appeal, the Court said that a defendant "must establish cause of a sufficient magnitude that it may be fairly said that a suspension of his license would be unjust or inequitable." *Id.* at 372, 744 P.2d at 100. The Court opined that a demonstrated physical inability to perform the requested test would be sufficient cause,[3] and that a psychological inability to perform the requested test--such as a fear of needles--may establish sufficient cause for refusing the test, but that such a psychological reason must be communicated to the officers so they could offer a different type of test. It is clear from *Griffiths* and its progeny that the conclusion that a defendant has or has not shown sufficient cause to render suspension of his license unjust or inequitable is a question of law for the courts. *See, e.g., Helfrich v. State*, 131 Idaho 349, 955 P.2d 1128 (Ct. App. 1998); *In re Goerig*, 121 Idaho 26, 822 P.2d 545 (Ct. App. 1991).

To establish his sufficient cause at the evidentiary hearing before the magistrate, Peugh presented testimony from a psychologist. The psychologist testified that based upon her review of the record of Peugh's behavior at the scene of the accident Peugh did not knowingly refuse to submit to the BAC test, but rather suffered from a debilitating anxiety that led to a type of psychological paralysis that prevented him from submitting to a BAC test because he was unable to decide whether or not to take the test. On cross-examination, the psychologist admitted that she did not review anything about Peugh's conduct at the jail, where the BAC test was to be administered and where Peugh affirmatively refused to take the BAC test. The arresting officer testified that while Peugh was uncooperative, he seemed to understand what was occurring when he refused to take the BAC test.

The magistrate was not persuaded that Peugh had satisfied his burden of showing sufficient cause to justify his refusal of the officer's BAC test. The magistrate accepted the psychologist's testimony that Peugh suffers from a number of mental problems. But the magistrate explained why it was not persuaded by the psychologist's conclusion that Peugh was unable to decide whether to take the BAC test. The magistrate said:

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[3] For an example of the demonstration of physical inability to perform a breath test, *see Helfrich v. State*, 131 Idaho 349, 955 P.2d 1128 (Ct. App. 1998).

> The court's problem with her testimony, however, is that she was not able to articulate how these maladies prevented him from taking the test, or even how the court could tell if this refusal was related to Peugh's mental issues as opposed to his intelligent decision to take the test.
>
> [The psychologist] implied that Peugh's problems prevented him from "doing the right thing" or "taking the ordinary course" of complying with the officer's request. Her testimony led to the conclusion that people who do not suffer from such problems would naturally submit to the breath test. But clearly that is not the case. People without any mental illnesses refuse the breath test for a number of reasons, and do so knowingly and willingly. Here, Peugh listened to the officer's instructions and then affirmatively refused to submit to the test. Had Peugh failed to respond to the request, or in any way indicated that he was under some type of stress rendering him incapable of making a decision, the court may be otherwise persuaded. But the facts show that Peugh did in fact make a decision – to refuse to submit to testing. Despite his emotional or mental issues, Peugh has failed to meet his burden of showing that these were the reasons behind his failure to submit to the breath test.

Peugh contends the psychologist's opinion should have been accepted by the magistrate as binding, relying upon the rule that the uncontradicted testimony of a credible witness must be accepted as true by the trier of fact unless the testimony is inherently improbable, or rendered so by the facts and circumstances disclosed by the hearing or trial or impeached by any of the modes known to the law, citing *Farber v. State*, 107 Idaho 823, 824, 693 P.2d 469, 470 (Ct. App. 1984). *See also*, *Dinneen v. Finch*, 100 Idaho 620, 626-27, 603 P.2d 575, 581-82 (1979). However, in weighing the psychologist's testimony, the magistrate did not hold that the testimony was not credible or untrue. As noted above in the quoted portion of the magistrate's decision, the magistrate explained the deficiencies and difficulties it found in applying the psychologist's conclusion to Peugh's situation. The magistrate provided a rational basis for not blindly accepting the psychologist's conclusions as a sufficient cause to preserve Peugh's driving privileges. It appears also that the psychologist's opinion involved a factual determination relating to Peugh's psychological condition at the time of the motor vehicle accident, but is not controlling on the ultimate legal determination of whether sufficient cause was shown to render suspension of Peugh's license unjust or inequitable.

Whether the required burden of proof on a particular issue has been met is a question for the trier of fact to decide in the first instance inasmuch as that court has the primary responsibility for weighing the evidence. *In re Estate of Bogert*, 96 Idaho 522, 526, 531 P.2d 1167, 1171 (1975) (citing *In re Estate of Cooke*, 96 Idaho 48, 524 P.2d 176 (1973)). The trial

court's decision that a claim has not been proved is entitled to great weight on appeal. *Id.*; *County of Canyon v. Wilkerson*, 123 Idaho 377, 848 P.2d 435 (Ct. App. 1993).

Where the lower court reaches a determination that is contrary to the claim alleged by a party, based on the evidence presented on both sides of the issue, the court effectively decides that the evidence is insufficient to support that party's contention. *County of Canyon v. Wilkerson*, 123 Idaho 377, 848 P.2d 435 (Ct. App. 1993); *Sivak v. State*, 119 Idaho 211, 804 P.2d 940 (Ct. App. 1991). In *Viehweg v. Thompson*, 103 Idaho 265, 647 P.2d 311 (Ct. App. 1982), we characterized this as a "negative" finding, i.e., that a party has failed in its burden of proof. On appeal, the appellate court's standard for review of such a finding is to determine if the lower court's decision is "clearly erroneous." *Id.* (citing I.R.C.P. 52(a)). Under the restrained standard of clear error customarily applied to factual issues, a factual finding will not be deemed clearly erroneous unless, after reviewing the entire record, an appellate court is left with a definite and firm conviction that a mistake has been made. *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948); *Quick v. Crane*, 111 Idaho 759, 768, 727 P.2d 1187, 1196 (1986); IDAHO APPELLATE HANDBOOK, *Standards of Appellate Review*, § 3.3.2 (2d ed. 1989). Finally, clear error will not be deemed to exist if the findings are supported by substantial and competent, though conflicting, evidence. *Barber v. Honorof*, 116 Idaho 767, 780 P.2d 89 (1989) (citing *Rasmussen v. Martin*, 104 Idaho 401, 659 P.2d 155 (Ct. App. 1983)). *See also State, Dep't of Health and Welfare v. Roe*, 139 Idaho 18, 72 P.3d 858 (2003).

We have reviewed the decision of the magistrate and conclude that the positive findings made by the magistrate are supported by substantial evidence in the record. We are not left with a definite and firm conviction that any mistake was made when the magistrate determined that Peugh had not satisfied his burden of proving his refusal to perform the requested BAC test provided sufficient cause to render suspension of his driver's license unjust or inequitable. The order suspending Peugh's driver's license is upheld. Because the district court on appeal affirmed the magistrate's decision, we likewise affirm the district court's appellate determination.

IV.
CONCLUSION

The magistrate did not err in concluding that Peugh failed to show sufficient cause for his refusal to submit to the BAC test. We agree with the magistrate's conclusion that it would not be

unjust or inequitable to suspend Peugh's driver's license for refusal to take the BAC test. The order suspending Peugh's driver's license is affirmed. Because we uphold the magistrate's findings and conclusion, we likewise affirm the district court's appellate decision sustaining the magistrate's order suspending Peugh's license.

Chief Judge GUTIERREZ and Judge PERRY **CONCUR.**